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JUPITER SECURITIES SDN BHD

v.

AMERICAN HOME ASSURANCE COMPANY

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: D4-22-1926-2001]
23 APRIL 2008

C ***CONTRACT:*** *Contractual terms - Indemnity - Whether losses suffered by plaintiff indemnifiable - Stockbrokers In & Out Indemnity Policy - Whether policy set out clear and unambiguous condition - Whether s. 2 of the policy complied with - Whether plaintiff contractually lost its right to be indemnified - Whether defendant entitled to reject claim*

D By a Stockbrokers In & Out Indemnity Policy ('the said policy') and in consideration of premiums paid by the plaintiff, the defendant agreed to insure and indemnify the plaintiff against various losses stipulated therein. During the currency of the said policy, on or about 1 April 1997, the plaintiff discovered that an employee, one Dariel Loh Yuen Tuck ('Dariel Loh') had allegedly committed certain acts to the financial detriment of the plaintiff. The plaintiff averred that the defendant and/or their agent were duly notified of the losses suffered by the plaintiff and that these losses were indemnifiable under the terms of the said policy. The defendant, however, averred otherwise. The issues that arose were (i) whether the plaintiff had complied with s. 2 of the said policy which requires the plaintiff as insured to 'give to the underwriters as soon as practical and in any event within 30 days after discovery by the assured of any loss hereunder notice in writing …' and (ii) whether the interpretation of the words in the policy was ambiguous in that it was capable of two different interpretations.

Held (dismissing plaintiff's claim):

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(1) Section 2 of the policy had set out a clear and unambiguous condition precedent that that notice must be given in writing to the underwriters. This was not complied with. On the literal interpretation of the word as explained in s. 11 of the policy, I it was clear that the plaintiff's claim was barred by s. 2 on the grounds the loss was not notified to the underwriters as

soon as practical and in any event within 30 days after discovery by the plaintiff as the assured party. None of the documents relied on showed that there was notification in writing to the underwriters within 30 days after discovery on 1 April 1997. It followed that operation of s. 2 would disentitle the plaintiff's claim. (paras 9, 12, 14 & 15)

(2) Section 11 of the policy explains discovery as occurring 'when the assured becomes aware of facts which would cause a reasonable person to assume that a loss covered by this policy has been or will be incurred, even though the exact amount or details of loss may not then be known …'. The facts would cause a reasonable person to assume that a loss covered under the policy of insurance would be incurred. The purpose of the term in the policy is that the insurers are made aware as soon as possible of probable claims so that they may if they so elect, to participate at an early stage in the investigation and determination of the claim. There was nothing impractical and ambiguous, and one must not attribute an ambiguity or impracticality to an agreement when in fact there was none. (para 17)

(3) The notification procedure would apply to require the plaintiff to notify the underwriters within 30 days of discovery. Since the plaintiff failed to comply with the requirements of a notice in writing to the underwriters within 30 days of discovery of the loss, the plaintiff had contractually lost its right to be indemnified under the said policy. (para 20)

(4) The pre-conditions to liability are substantive conditions and could not be dismissed as being merely technical in nature. The written notice is a specific policy condition. The rejection in this case, therefore, was within the Bank Negara Malaysia (BNM) Guidelines. The defendant was entitled to rely upon s. 2 above in rejecting the claim. (para 23)

Case(s) referred to:

MBf Finance Bhd v. Sim Peng Bee [2003] 1 CLJ 690 HC ***(refd)***

Putra Perdana Construction Sdn Bhd v. AMI Insurans Bhd & Ors [2004] 8 CLJ 538 HC ***(refd)***

For the plaintiff - Rajinder Singh (Godfrey D'cruz & Mohan Krishnan with him); M/s Sri Ram & Co
For the defendant - YK Ng (Lawrence KN Low with him); M/s Thakurta Low & Rajendra

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail J:

[1] By a Stockbrokers In & Out Indemnity Policy No. FG-1019/97-KL dated 20 February 1997 (the "said policy") and in consideration of premiums paid by the plaintiff, the defendant agreed to insure and indemnify the plaintiff against various losses stipulated therein. A limit to the indemnities under the policy is stipulated in the said policy.

[2] On or about 1 April 1997, and during the currency of the said policy, the plaintiff discovered that an employee, one Dariel Loh Yuen Tuck ("Dariel Loh"), had allegedly committed certain acts to the financial detriment of the plaintiff. The plaintiff averred in para 5 of the statement of claim that the defendant and/or their agent were duly notified of the losses suffered by the plaintiff and that these losses are indemnifiable under the terms of the said policy. The defendant averred otherwise. No particulars of notification were pleaded by the plaintiff. Neither did it plead the identity of the agent.

[3] Section 2 of the Special Conditions and Extensions of the said policy provided for notification of claims and it reads as follows:

> The Assured shall as, a condition to their right to be indemnified under this Policy, give to the Underwriters as soon as practical and in any event within 30 days after discovery by the Assured of any loss hereunder notice in writing of:
>
> a) any claim made, or loss sustained;
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> b) any circumstances of which the Assured shall become aware which may subsequently give rise to a claim, any claim subsequently arising from circumstances so notified being dealt with under this Certificate as though the same had been made during the period of this Certificate;

c) the discovery of reasonable cause for suspicion of fraud, dishonesty or forgery on the part of any of their Employees, whether giving rise to a claim or not.

[4] On the question whether the plaintiff had complied with s. 2 of the policy, the first document relied upon is a letter dated 23 October 1998 from the plaintiff to Messrs. Bradstock Insurance Brokers Sdn. Bhd. enclosing a duly completed Insurance Claim Form. The broker is not the Underwriter and neither is the broker the agent of the defendant.

[5] The second document is a letter dated 2 November 1998 from Messrs. Bradstock Insurance Brokers Sdn. Bhd. to the plaintiff acknowledging receipt of the claims notification. The letter stated "We acknowledge receipt of your claim notification dated 23 October 1998 and confirm having notified the insurers accordingly." The fact that the letter is written copied to American Home Assurance Company (defendant) does not prove that the copy was indeed received by the defendant. There is no acknowledgement of receipt. This is in contrast with two other notifications unconnected with this claim which shows that the notifications were acknowledged receipt by the defendant.

[6] Another document relied upon is a letter dated 16 November 1999 from Messrs. Bradstock Insurance Brokers Sdn. Bhd. to the plaintiff. It is a letter between an insurance broker and its client, the plaintiff. It is not notification in writing from the plaintiff to the Underwriters. At most, it is merely an alleged account to show that the plaintiff had, on January 1998, intimated the loss to Underwriters through a different insurance broker (Messrs. Johnson & Higgins) to pursue a claim under a different insurance policy (Kuala Lumpur Stock Exchange Policy).

[7] This court had, on 13 June 2005, during the case management suggested the plaintiff to obtain a letter of confirmation from Messrs. Bradstock Insurance Brokers Sdn. Bhd. whether notification in writing was given to the defendant and details of the same be produced. The plaintiff has not produced any such confirmation.

[8] In *Putra Perdana Construction Sdn Bhd v. AMI Insurans Bhd & Ors* [2004] 8 CLJ 538, Justice Dato' Ramly Ali held that: "When a term in a policy is stipulated to be a condition precedent to the liability of the insurer, the condition has to be strictly complied with by the insured before the insured is entitled to bring a claim on the policy." A breach of a clearly expressed condition precedent is a complete defence to a claim under a policy of insurance.

[9] Section 2 of the policy sets out a clear and unambiguous condition precedent that that notice must be given in writing to the Underwriters. This was not complied with. There is no provision for notification to be given to any third party or agent. Messrs. Bradstock Insurance Brokers Sdn. Bhd. is neither the defendant's agent nor an Underwriter.

[10] Section 2 also requires the plaintiff as insured to "give to the Underwriters as soon as practical and in any event within 30 days after discovery by the assured of any loss hereunder notice in writing …".

[11] The term "discovery" in s. 11 of the policy provides:

> This Policy applies to loss discovered by the Assured during the Certificate period. Discovery occurs when the Assured becomes aware of facts which would cause a reasonable person to assume that a loss covered by this Policy has been or will be incurred, even though the exact amount or details of loss may not then be known. Notice to the Assured of an actual or potential claim by a third party which alleges that the Assured is liable under the circumstances which, if true, would create a loss under this Certificate constitutes such discovery. This condition is subject to the terms of Special Condition 2.

[12] On the literal interpretation of the word as explained in s. 11 above, it is clear that the plaintiff's claim is barred by s. 2 on the grounds the loss was not notified to the Underwriters as soon as practical and in any event within 30 days after discovery by the plaintiff as the assured party.

[13] The plaintiff, by para 4(a) of the statement of claim, admitted that discovery was made on 1 April 1997. A police report No. 12044/97 lodged by the Plaintiff's General Manager (Operations) Tan Chee Siong on 17 May 1997 shows that the complainant (Tan Chee Siong) had knowledge on 1 April 1997 that the share

trading accounts with respect to three clients of the plaintiff had far exceeded the limits by reason of their large acquisition of Nauticalink Berhad shares. The complainant went on further to state that the conspiracy between Dariel Loh and the three clients in their attempt to deny the purchase of the shares has resulted in a potential loss estimated at approximately RM10 million.

[14] None of the documents relied on show that there was notification in writing to the Underwriters within 30 days after discovery on 1 April 1997.

[15] It follows that operation of s. 2 would disentitle the plaintiff's claim.

[16] It was argued alternatively that the words "as soon as practical and in any event within 30 days after discovery ... of any loss" is ambiguous in that it is capable of two different interpretations. It was suggested it can mean either the date of the loss itself or it can also mean after the plaintiff had ascertained that a loss covered within the policy had occurred. It was submitted it may not be practical to notify the defendant within 30 days after discovery on 1 April 1997 of the plaintiff's loss, unless discovery is understood to mean knowledge that a 'loss' had in fact occurred as covered under the policy. It was submitted that in this case it was only practical to notify the defendant that "a loss covered by the policy has been incurred or will be incurred" after the domestic inquiry had been completed by the plaintiff on 14 February 1998. The inquiry panel only made their findings on 16 February 1998, when it was established that Dariel Loh, the said employee of the plaintiff, was guilty or responsible for dishonest or fraudulent acts with the manifest intention to cause the plaintiff to suffer loss. It was argued that only after the domestic inquiry was completed did the plaintiff "become aware of the facts which caused the plaintiff to assume that a loss covered by the policy had occurred. It was argued that the loss was discovered as falling within the coverage of the policy in February 1998 only after the domestic inquiry was completed and the plaintiff notified the defendant and or their agents of the claim.

[17] The above argument fails to appreciate s. 11 which explains discovery as occurring "when the assured becomes aware of facts which would cause a reasonable person to assume that a loss covered by this policy has been or will be incurred, even though the exact amount or details of loss may not then be known. ...". The facts that triggered the inquiry would cause a reasonable person to assume that a loss covered under the policy of insurance will be incurred. The purpose of the term in the policy is that the insurers are made aware as soon as possible of probable claims so that they may if they so elect, to participate at an early stage in the investigation and determination of the claim. Be that as it may, there is nothing impractical and ambiguous, and one must not attribute an ambiguity or impracticality to an agreement when in fact there is none. In *MBf Finance Bhd v. Sim Peng Bee & Anor* [2003] 1 CLJ 690 Justice Low Hop Bing (as he then was) held:

> This basic rule of construction means that where an ambiguity or doubt arises in the interpretation of a written document such as an agreement, that ambiguity or doubt would be resolved by construing the agreement against the person who drafted, prepared or put forward the agreement. In this appeal, I am unable to identify the part of the agreement which has suffered from an ambiguity or a doubt. One must not attribute an ambiguity or doubt to an agreement when in reality there was none.

[18] The policy in this case was not renewed with the defendant when the policy expired on 31 December 1997. The plaintiff renewed its insurance cover with a different insurance company namely, MBf Insurance Berhad, under a "Comprehensive Crime and Professional Indemnity Insurance For Member Companies of Kuala Lumpur Stock Exchange". Non-renewal of the insurance cover with the defendant makes it necessary to consider the following provision in the preamble in the policy:

> This Insurance is to indemnify the Assured against loss first discovered by them during the period of insurance as set out in the Schedule and in the event of non renewal, within 18 calendar months of the expiration thereof to have been incurred or sustained during the period of insurance in the following manner:

[19] It was submitted this would mean that the plaintiff had 18 months from 31 December 1997 within which to notify the defendant of the instant claim/loss, namely up until 30 June 1999. Thus, it would allow for discovery and notification to take place

in excess of 30 days after a loss has occurred during the period of insurance if the policy is not renewed with the defendant. It was submitted it was in clear contradiction with the notification of claims provision.

[20] The provision was in the preamble. It was clearly stated the policy was "to indemnify the assured … in the following manner". The policy then proceeded to set out the terms and conditions. The policy set out special conditions and extensions, which *inter alia* provided for the notification of claims. There is in my view no contradiction or ambiguity. Even if there were, the specific term must override the general introductory words of the preamble. It is clear thus the notification procedure would apply to require the plaintiff to notify the Underwriters within 30 days of discovery. Since the plaintiff failed to comply with the requirements of a notice in writing to the Underwriters within 30 days of discovery of the loss, the plaintiff has contractually lost its right to be indemnified under the said policy.

[21] The plaintiff sought to rely on the 'claims settlement practices' issued by the Insurance Regulation & Supervision Department of Bank Negara Malaysia to disentitle the defendant from rejecting the plaintiff's claim based on the notification of claims provision. The guidelines on claims settlement practices dated 25 February 1995 provides as follows:

> "An insurer should not deny claim based upon the failure of the Insured to give written notice of loss within a specified time limit unless the written notice is a written policy condition, or the claimant's failure to give written notice after being requested to do so is so unreasonable as to constitute a breach of the claimant's duty to cooperate with the insurer". The provision in this case is a written policy condition and is not barred by the guideline.

[22] In *Putra Perdana Construction Sdn Bhd v. AMI Insurans Bhd & Ors* [2004] 8 CLJ 538, Justice Ramly Ali J had to consider whether the defendants had failed to comply with Bank Negara Malaysia (BNM) Guidelines in denying the claim merely on the ground of a technical breach of warranty or policy conditions which were immaterial or unconnected to the circumstances of the loss, there being no fraud in that case. Justice Ramly Ali held that "even assuming that the said BNM Guidelines have the force of law (being subsidiary legislations), the court is of the view that the

relevant paragraph at p. 9 of the guidelines does not cover the situation in the present case. In other words, in repudiating their liability under the policy, the defendants did not breach the said provisions of the BNM Guidelines".

[23] The pre-conditions to liability are substantive conditions and cannot be dismissed as being merely technical in nature. The written notice is a specific written policy condition. The rejection in this case, therefore, is within the BNM Guidelines. Even if it were not this court accepts that BNM Guidelines are only guidelines and not law, the court holds the defendant is entitled to rely upon s. 2 above in rejecting the claim.

[24] The plaintiff's claim was, therefore, dismissed with costs.